



United States
Department of
Agriculture

Forest
Service

Rocky Mountain Region

1617 Cole Boulevard
Lakewood, CO 80401
303-275-5350
Fax: 303-275-5366

File Code: 6270; 2210
(2018-FS-R2-05942-F)
Date: SEP 05 2018

Matthew Sandler
Staff Attorney
Rocky Mountain Wild
1536 Wynkoop Street, Suite 900
Denver, CO 80202

Dear Mr. Sandler:

This letter continues the communications regarding your Freedom of Information Act (FOIA) request dated July 20, 2018. The Forest Service responded to your FOIA request with an acknowledgment letter dated August 7, 2018 and you replied via letter on August 16, 2018. We have also supplied you with a letter dated September 5, 2018 regarding FOIA tracking number 2018-FS-R2-05258-F. We have assigned a second tracking number to a portion of your request. That number is 2018-FS-R2-05942-F.

Request 2018-FS-R2-05942-F

You know that the Village at Wolf Creek access issue is subject to current litigation. The cases are: Rocky Mountain Wild, et al. v. Dallas, et al., 15-cv-01342-RPM (District of Colorado) and Rocky Mountain Wild, et al. v. Dallas et al., 17-1366, 17-1408, 17-1413 (Tenth Circuit Court of Appeals). RMW is involved in these ongoing cases. The United States was a party to the litigation until May 14, 2018. RMW has also been involved in FOIA litigation against the Forest Service. The recent cases are: Rocky Mountain Wild v. U.S. Forest Service, et al., 14-cv-012496 (District of Colorado), Rocky Mountain Wild v. U.S. Forest Service, et al., 15-cv-00127-WJM (District of Colorado), and Rocky Mountain Wild v. U.S. Forest Service, et al., 17-1119 (Tenth Circuit Court of Appeals).

We understand the subject matter scope of the original FOIA request letter dated July 20, 2018 included any communications within, among and between the Forest Service, USDA's Office of the General Counsel (OGC) and the Department of Justice (DOJ) as related to these cases. These records would include all email communications regarding case strategy as well as drafts of pleadings. In order to clarify the discussions with you, we are assigning this set of records a separate FOIA tracking number, specifically, 2018-FS-R2-05942-F. The date range for this set of records is November 20, 2014 through July 20, 2018.

We previously asked you to limit the scope of your FOIA request. We stated that we would understand your FOIA request to *not* include any communications within, among and between the Forest Service, USDA's Office of the General Counsel (OGC) and the Department of Justice (DOJ) as related to these cases. Any such communications would be within the attorney-client privilege. RMW could not reasonably expect to receive such records in response to a FOIA request. If RMW pursued such a request, the most that RMW could expect to receive at the end



of the request, an administrative appeal, and any litigation on the subject would be a large privilege log of records covered by the attorney-client privilege.

When we asked you to narrow the scope of your FOIA request to exclude these records, you explicitly rejected this request.

Fee Waiver, Request 2018-FS-R2-05942-F

RMW requested a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii). The FOIA request was submitted by you on behalf of three entities: Rocky Mountain Wild (RMW), San Luis Valley Ecosystem Council (SLVEC), and San Juan Citizens Alliance (SJCA).

We understand that SLVEC and SJCA have voluntarily withdrawn from the FOIA request.

The United States Department of Agriculture (USDA) regulation regarding FOIA fees is at 7 C.F.R. Appendix A to Subpart A of Part 1. That regulation includes a discussion of FOIA fee waiver requests submitted to USDA agencies such as the Forest Service. The regulation includes six factors that the agency uses to evaluate fee waiver requests. In your August 16, 2018 letter you listed all of the six factors and provided explanatory text on each of them for the requested fee waiver.

Your request for a fee waiver regarding FOIA Request 2018-FS-R2-05942-F is hereby granted.

Miscellaneous

As we stated in our previous correspondence, we have identified July 20, 2018 as the end date for the search for records. Here, the FOIA request involves many custodians and ongoing matters. There may be new records, usually in the form of emails, being created each day. In order to manage this type of search and records production activity, the agency must set a specific end date for the search. We are linking the end date for the search to the date of your FOIA request.

We re-state our request that you acknowledge that the complexity of your FOIA request constitutes *unusual circumstances* as stated at 7 C.F.R. § 1.16(b) as well as *exceptional circumstances* as listed at 5 U.S.C. § 552(a)(6)(C).

If you have any questions regarding this letter, please contact Chris Wehrli at (303) 275-5108 or via e-mail at r2_ro_e-foia@fs.fed.us.

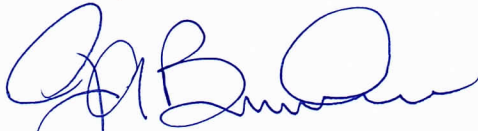
If you need any further assistance or would like to discuss any aspect of your request, please do not hesitate to contact the FOIA Public Liaison at (202) 205-1542. Additionally, you may contact the Office of Government Information Services (OGIS) National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770 or toll free at (877) 684-6448; or via facsimile at (202) 741-5769.

Matthew Sandler

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If you do not agree with the determinations stated in this letter, you have the right to submit an appeal to the Chief. Any appeal must be made in writing, within 45 days from the date of this letter, to the Chief, USDA, Forest Service: 1) by email to wo_foia@fs.fed.us; 2) by regular mail to Mail Stop 1143, 1400 Independence Avenue, SW, Washington, DC 20250-1143; 3) by Fed Ex or UPS to 201 14th Street, SW, Washington, DC 20250-1143 and telephone (202) 205-1542; 4) by fax at (202) 260-3245. The term "FOIA APPEAL" should be placed in capital letters on the subject line of the email or on the front of the envelope. To facilitate the processing of your appeal, please include a copy of this letter and/or the control number assigned to your request (FOIA No. 2018-FS-R2-05942-F).

Sincerely,

A handwritten signature in blue ink, appearing to read "B. Ferebee", written over a horizontal line.

BRIAN FEREBEE
Regional Forester

cc: Dan Dallas, Guy Blackwolf, Christopher Wehrli, Misty DeSalvo



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Date: SEP 05 2018

Matthew Sandler
Staff Attorney
Rocky Mountain Wild
1536 Wynkoop Street, Suite 900
Denver, CO 80202

Dear Mr. Sandler:

This letter continues the communications regarding your Freedom of Information Act (FOIA) request dated July 20, 2018. Your request was received electronically by the Regional Office FOIA Coordinator on July 23, 2018 and was assigned FOIA tracking number 2018-FS-R2-05258-F.

The Forest Service responded to your FOIA request with an acknowledgment letter dated August 7, 2018 and you replied via letter on August 16, 2018.

Through today's correspondence, we are assigning a second tracking number to a portion of your request. That number is 2018-FS-R2-05942-F. The details of this second tracking number are explained further below.

The "RE:" block of your FOIA request summarized the request as seeking:

[A]ll agency records regarding the proposed Village at Wolf Creek Access Project, the July 19, 2018 Draft Record of Decision, and anything else relating to this project or the agency action including internal and external communications, consultation with the U.S. Fish and Wildlife Service, contact with other agencies, contact with Leavell-McCombs Joint Venture and communications with any other entity.

The main text of your letter stated the FOIA request as follows:

[A]ll agency records of the U.S. Forest Service ("FS") related to the proposed Village at Wolf Creek Access Project.



In particular this request seeks any and all records regarding:

- *The July 19, 2018 Draft Record of Decision[;]*
- *Canada lynx or any other listed or proposed species;*
- *Any consultation regarding this project;*
- *The proposed ANILCA access or other access alternatives; [and]*
- *Any other records, communications with any entity, and information in any form regarding Wolf Creek pass, Access to LMJV's private parcel, or anything considered directly or indirectly by the agency specialist or Interdisciplinary Team topic.*

You requested a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii). The FOIA request was submitted by you on behalf of three entities: Rocky Mountain Wild (RMW), San Luis Valley Ecosystem Council (SLVEC), and San Juan Citizens Alliance (SJCA).

We understand that SLVEC and SJCA have voluntarily withdrawn from the FOIA request.

Request 2018-FS-R2-05258-F

In order to proceed with processing Request 2018-FS-R2-05258-F we are clarifying the scope of the request. We are now interpreting the series of correspondence as a request for the following records:

- All agency records of the Forest Service related to the proposed Village at Wolf Creek Access Project, from November 20, 2014 through June 24, 2015. (This set of records starts on the date specified in your FOIA request and ends on the date that RMW filed suit against the Forest Service in the case captioned Rocky Mountain Wild, et al. v. Dallas, et al., 15-cv-01342-RPM (District of Colorado))
- All non-privileged communications, related to the proposed Village at Wolf Creek Access Project, with external entities such as the U.S. Fish and Wildlife Service, other agencies, and the Leavell-McCombs Joint Venture, from November 20, 2014 through July 20, 2018. (This set of records – focused on non-privileged communications with external entities – runs from the date specified in your FOIA request through July 20, 2018.)
- All records related to the development of the July 19, 2018 Draft Record of Decision, from January 12, 2018 through July 20, 2018. (The Forest Service did not initiate the activity to develop the July 19, 2018 Draft Record of Decision until early in 2018. The earliest date that the agency initiated any work on this document was January 12, 2018. Consequently, we are assigning a date range for this set of records as noted above.)

As we stated in our previous correspondence, we have identified July 20, 2018 as the end date for the search for records. Here, the FOIA request involves many custodians and an ongoing matter. There may be new records, usually in the form of emails, being created each day. In order to manage this type of search and records production activity, the agency must set a specific end date for the search. We are linking the end date for the search to the date of your FOIA request.

We are initiating a search for records in these three categories. We will process the subject records for release or appropriate FOIA exemptions when they are collected. If you wish to discuss these clarifications further, we invite you to contact us at any time, or to pursue any appeal avenues that you believe are appropriate.

Fee Waiver, Request 2018-FS-R2-05258-F

RMW requested a fee waiver. The United States Department of Agriculture (USDA) regulation regarding FOIA fees is at 7 C.F.R. Appendix A to Subpart A of Part 1. That regulation includes a discussion of FOIA fee waiver requests submitted to USDA agencies such as the Forest Service. The regulation includes six factors that the agency uses to evaluate fee waiver requests. These six factors are summarized and discussed on the Forest Service web page related to FOIA at this link: <https://www.fs.fed.us/im/foia/feefactors.htm>.

In your August 16, 2018 letter you listed all of the six factors and provided explanatory text on each of them for the requested fee waiver.

Your request for a fee waiver regarding FOIA Request 2018-FS-R2-05258-F is hereby granted.

Request 2018-FS-R2-05942-F

You know that the Village at Wolf Creek access issue is subject to current litigation. The cases are: Rocky Mountain Wild, et al. v. Dallas, et al., 15-cv-01342-RPM (District of Colorado) and Rocky Mountain Wild, et al. v. Dallas et al., 17-1366, 17-1408, 17-1413 (Tenth Circuit Court of Appeals). RMW is involved in these ongoing cases. The United States was a party to the litigation until May 14, 2018. RMW has also been involved in FOIA litigation against the Forest Service. The recent cases are: Rocky Mountain Wild v. U.S. Forest Service, et al., 14-cv-012496 (District of Colorado), Rocky Mountain Wild v. U.S. Forest Service, et al., 15-cv-00127-WJM (District of Colorado), and Rocky Mountain Wild v. U.S. Forest Service, et al., 17-1119 (Tenth Circuit Court of Appeals).

Records that are within the subject matter scope of your FOIA request and that are related these cases are assigned a separate FOIA tracking number, specifically, 2018-FS-R2-05942-F. The date range for this set of records is November 20, 2014 through July 20, 2018. These records are discussed briefly in a separate letter to you.

Matthew Sandler

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Miscellaneous

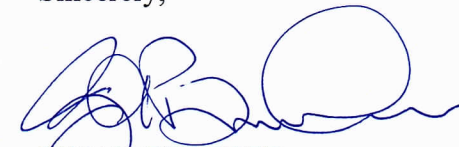
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If you have any questions regarding this letter, please contact Chris Wehrli at (303) 275-5108 or via e-mail at r2_ro_e-foia@fs.fed.us.

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Sincerely,



BRIAN FEREBEE
Regional Forester

cc: Dan Dallas, Guy Blackwolf, Christopher Wehrli, Misty DeSalvo